

LORENA ESTRADA, O/B/O,
J.E., A MINOR CHILD

Plaintiff,

v.

MICHAEL J. ASTRUE, Commissioner
of Social Security,

Defendant.

)
) No. CV-10-3117-CI
)
) ORDER GRANTING PLAINTIFF'S
) MOTION FOR SUMMARY JUDGMENT
) AND ORDERING REMAND
)
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JURISDICTION

On December 17, 2007, Plaintiff protectively filed a Title II application for a period of disability and disability insurance benefits. (TR. 16; 155.) He alleged disability due to Attention Deficit Hyperactivity Disorder (ADHD). (Tr. 159.) Plaintiff's claim was denied initially and on reconsideration, and he requested a hearing before an administrative law judge (ALJ). (Tr. 62-114.) A hearing was held on October 23, 2009, at which Medical Expert

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1 Thomas McKnight, Ph.D, and Plaintiff's mother, whose child was
2 represented by counsel, testified. (Tr. 40-55.) ALJ Robert S.
3 Chester presided. (Tr. 35.) The ALJ denied benefits on November
4 19, 2009. (Tr. 16-29.) The instant matter is before this court
5 pursuant to 42 U.S.C. § 405(g).

6 **STATEMENT OF THE CASE**

7 The facts of the case are set forth in detail in the transcript
8 of proceedings and are briefly summarized here. At the time of the
9 hearing, Plaintiff was in the fourth grade. (Tr. 40.) He lived
10 with his mother and three siblings. (Tr. 228.) Plaintiff was
11 diagnosed with Attention Deficit Hyperactivity Disorder (ADHD) and
12 Oppositional Defiance Disorder (ODD). (TR. 228; 233.) His mother
13 reported that he has a very bad temper, he steals and destroys
14 property, and he gets poor grades and does not get along well with
15 others. (Tr. 210.)

16 On April 11, 2006, the Yakima School District #7, Special
17 Education Services, concluded Plaintiff was not eligible for special
18 education services, in part because Plaintiff's test results at that
19 time were significantly and adversely affected by his limited
20 English proficiency, cultural environmental factors, and Plaintiff's
21 lack of reading or math instruction. (Tr. 140-41.)

22 Plaintiff's teacher observed in a report dated April 17, 2007,
23 that he had several "obvious problems" in acquiring and using
24 information, with interacting and relating with others, and "serious
25 problems" in caring for himself. (Tr. 166; 168; 170.) The teacher
26 also noted that depending upon Plaintiff's mood, he can "become very
27 defiant and refuse to do anything." (Tr. 166.) The following year,
28 in a report dated January 30, 2008, Plaintiff's second grade teacher

1 indicated that he had several "serious problems" in acquiring and
2 using information without one-on-one attention, and in attending and
3 completing tasks. (Tr. 197-98.) The teacher also reported that
4 Plaintiff had several "obvious problems" in interacting and relating
5 with others and in caring for himself. (Tr. 199; 201.) The teacher
6 noted that she had to take steps to keep Plaintiff from being
7 distracted, and when he does not understand a problem, he pouts and
8 becomes disruptive to the class. (Tr. 199-201.)

9 Plaintiff's mother completed a Function Report about Plaintiff
10 on March 8, 2007, and on January 10, 2008. (Tr. 145-54; 175-84.)
11 In both reports, Plaintiff's mother indicated Plaintiff had
12 limitations in his ability to progress in learning, help himself and
13 cooperate with others in taking care of personal needs and pay
14 attention and stick with a task. (Tr. 149; 152-53; 179; 182-83.)
15 Plaintiff's mother also indicated Plaintiff is unable to make new
16 friends, get along with adults and his teachers, and he is unable to
17 play team sports. (Tr. 151; 181.)

18 ADMINISTRATIVE DECISION

19 At step one, the ALJ found that Plaintiff has not engaged in
20 substantial gainful activity. (Tr. 19.) At step two, he determined
21 that Plaintiff suffers from the severe impairment of attention
22 deficit hyperactivity disorder (ADHD). (Tr. 19.) The ALJ
23 determined that Plaintiff's impairment, although severe, does not
24 meet, medically equal, or functionally equal the criteria of any of
25 the listings impairments. (Tr. 19.) With regard to functional
26 equivalence, the ALJ concluded that Plaintiff does not have an
27 "extreme" limitation in any domain of functioning or a "marked"
28 limitation in two domains. (Tr. 29.) Accordingly, the ALJ concluded

1 Plaintiff was not disabled within the meaning of the Social Security
2 Act. (Tr. 29.)

3 STANDARD OF REVIEW

4 In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001), the
5 court set out the standard of review:

6 A district court's order upholding the Commissioner's
7 denial of benefits is reviewed *de novo*. *Harman v. Apfel*,
8 211 F.3d 1172, 1174 (9th Cir. 2000). The decision of the
9 Commissioner may be reversed only if it is not supported
10 by substantial evidence or if it is based on legal error.
11 *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999).
12 Substantial evidence is defined as being more than a mere
13 scintilla, but less than a preponderance. *Id.* at 1098.
14 Put another way, substantial evidence is such relevant
15 evidence as a reasonable mind might accept as adequate to
16 support a conclusion. *Richardson v. Perales*, 402 U.S.
17 389, 401 (1971). If the evidence is susceptible to more
18 than one rational interpretation, the court may not
19 substitute its judgment for that of the Commissioner.
20 *Tackett*, 180 F.3d at 1097; *Morgan v. Commissioner of*
21 *Social Sec. Admin.*, 169 F.3d 595, 599 (9th Cir. 1999).

22 The ALJ is responsible for determining credibility,
23 resolving conflicts in medical testimony, and resolving
24 ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th
25 Cir. 1995). The ALJ's determinations of law are reviewed
26 *de novo*, although deference is owed to a reasonable
27 construction of the applicable statutes. *McNatt v. Apfel*,
28 201 F.3d 1084, 1087 (9th Cir. 2000).

29 It is the role of the trier of fact, not this court, to resolve
30 conflicts in evidence. *Richardson*, 402 U.S. at 400. If evidence
31 supports more than one rational interpretation, the court may not
32 substitute its judgment for that of the Commissioner. *Tackett*, 180
33 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9th Cir. 1984).
34 Nevertheless, a decision supported by substantial evidence will
35 still be set aside if the proper legal standards were not applied in
36 weighing the evidence and making the decision. *Browner v. Secretary*
37 *of Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988). If
38 substantial evidence exists to support the administrative findings,

1 or if conflicting evidence exists that will support a finding of
2 either disability or non-disability, the Commissioner's
3 determination is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-
4 1230 (9th Cir. 1987).

5 **SEQUENTIAL PROCESS**

6 To qualify for disability benefits, a child under the age of
7 eighteen must have "a medically determinable physical or mental
8 impairment, which results in marked and severe functional
9 limitations, and which can be expected to result in death or which
10 has lasted or can be expected to last for a continuous period of not
11 less than 12 months." 42 U.S.C. § 1382c(a)(3)(C)(I). The Social
12 Security Administration has enacted a three-step sequential analysis
13 to determine whether a child is eligible for SSI benefits on the
14 basis of a disability. 20 C.F.R. § 416.924(a). First, the ALJ
15 considers whether the child is engaged in "substantial gainful
16 activity." *Id.* at § 416.924(b). Second, the ALJ considers whether
17 the child has a "medically determinable impairment that is severe,"
18 which is defined as an impairment that causes "more than minimal
19 functional limitations." *Id.* at § 416.924(c). Finally, if the ALJ
20 finds a severe impairment, he or she must then consider whether the
21 impairment "medically equals" or "functionally equals" a disability
22 listed in the regulatory "Listing of Impairments." *Id.* at §
23 416.924(c)-(d). An impairment is functionally equivalent to a
24 listed impairment if it results in extreme limitations in one area
25 of functioning or marked limitations in two areas. 20 C.F.R. §
26 416.926a (a). An impairment is a "marked limitation" if it
27 "seriously interferes with [a person's] ability to independently
28 initiate, sustain, or complete activities." 20 C.F.R. §

1 416.926a(e)(2)(I). By contrast, an "extreme limitation" is defined
2 as a limitation that "interferes very seriously with [a person's]
3 ability to independently initiate, sustain, or complete activities."
4 20 C.F.R. § 416.926a(e)(3)(I).

5 In determining whether an impairment exists, the ALJ assesses
6 the child's functioning in six domains in terms of his/her ability
7 to: (1) acquire and use information; (2) attend and complete tasks;
8 (3) interact and relate with others; (4) move about and manipulate
9 objects; (5) care for oneself, and (6) his/her general health and
10 physical well-being. 20 C.F.R. § 416.926a(a)-(b)(2001). To
11 demonstrate functional equivalence under the Final Rules, the child
12 must exhibit a marked limitation in two of the domains, or an
13 extreme limitation in one domain. 20 C.F.R. § 416.926a(e)(2)(I).

14 ISSUES

15 Plaintiff contends that the ALJ erred by improperly weighing
16 the medical evidence. Specifically, J. Camille Beauchamp, ARNP,
17 assessed him markedly limited in at least two domains, and the ALJ
18 failed to give proper reasons for rejecting her opinions. (ECF NO.
19 14 at 9-12.) Plaintiff also argues that the ALJ failed to give any
20 reasons for discounting the opinions of Plaintiff's teachers and
21 mother. (ECF NO. 14 at 9-12.) Finally, Plaintiff argues that the
22 ALJ erred by concluding Plaintiff's impairments do not functionally
23 equal the Listing. (ECF No. 14 at 13-15.) Defendant contends the
24 ALJ's decision is supported by substantial evidence and free of
25 legal error. (ECF No. 16.)

26 DISCUSSION

27 A. Opinion of J. Camille Beauchamp, ARNP

28 Plaintiff contends that the ALJ erred by improperly rejecting

1 his treating and examining providers. Specifically, Plaintiff
2 argues "his therapist," J. Camille Beauchamp, ARNP, assessed him as
3 markedly limited in at least two domains, and the ALJ failed to give
4 proper reasons for rejecting her opinions. (ECF No. 14 at 9-10.)
5 The ALJ stated he gave little weight to the opinion of Ms. Beauchamp
6 because she is not an acceptable treating source, she failed to
7 provide treatment notes to support her opinions, and her opinion
8 that Plaintiff had marked limitations was inconsistent with test
9 results and teacher evaluations. (Tr. 23.)

10 Under the Social Security regulations, licensed physicians are
11 considered "acceptable medical sources," but nurse practitioners are
12 not and instead are deemed "other medical sources." 20 C.F.R. §§
13 404.1513(a)(1); 20 C.F.R. 416.913(a)(1); 20 C.F.R. §§
14 404.1513(d)(1), 20 C.F.R. 416.913(d)(1). Only acceptable medical
15 sources can give medical opinions and, therefore, evidence from
16 acceptable medical sources is needed to establish the existence of
17 a medically determinable impairment. See SSR 06-03p. Evidence from
18 other medical sources cannot establish the existence of a medically
19 determinable impairment but may still be used to show the severity
20 of an individual's impairment and how the impairment affects the
21 individual's ability to function. See SSR 06-03p.

22 Because acceptable medical sources are considered the most
23 qualified health care professionals, the ALJ may "accord opinions
24 from other [medical] sources less weight than opinions from
25 acceptable medical sources." *Gomez v. Chater*, 74 F.3d 967, 970-71
26 (9th Cir. 1996). However, in certain circumstances, an opinion from
27 an other medical source may outweigh the opinion of an "acceptable
28 medical source," including the medical opinion of a treating source.

1 SSR 06-03P. For example, it may be appropriate to give more weight
2 to the opinion of a medical source who is not an "acceptable medical
3 source" if he or she has seen the individual more often than the
4 treating source and has provided better supporting evidence and a
5 better explanation for his or her opinion. SSR 06-03P.

6 Accordingly, an ALJ must consider the opinions of other medical
7 sources and explain the weight given to those opinions to allow a
8 subsequent reviewer to follow his or her reasoning, when such
9 opinions may have an effect on the outcome of the case. SSR 06-03p.
10 In general, it is error for an ALJ to discount the opinion of a
11 registered nurse merely because she is not an accepted medical
12 source when the nurse has seen the patient often, or provides better
13 supporting evidence than the other medical sources. In this case,
14 however, Plaintiff failed to establish that Nurse Beauchamp was
15 entitled to greater weight on this basis, because Plaintiff failed
16 to provide supporting evidence or chart notes that established a
17 relationship and supported her opinions. As a result, under these
18 circumstances it was not error for the ALJ to give Ms. Beauchamp's
19 opinions less weight because she was not an accepted medical source.

20 The ALJ also gave little weight to Ms. Beauchamp's assessment
21 because her opinions were inconsistent with test results showing
22 Plaintiff's average cognitive abilities and teacher reports
23 indicating Plaintiff can "maintain attention and concentration with
24 redirection." (Tr. 23.) This reason is not supported by
25 substantial evidence. On August 7, 2009, Nurse Beauchamp completed
26 a form about Plaintiff's limitations, and indicated he had marked
27 limitations in acquiring and using information and attending and
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1 completing tasks. (Tr. 265; 267.) Ms. Beauchamp also noted
2 "[patient] and mother report that, when he takes his medication and
3 his symptoms are controlled, he feels well." (Tr. 267.)

4 With regard to the testing, Plaintiff's April 2006 verbal and
5 performance IQ scores were deemed invalid, due to cultural and
6 language factors. (Tr. 135.) His Comprehensive Test of Nonverbal
7 Intelligence test results fell within the average range of skills.
8 (Tr. 136.) Diane Liebe, M.D., examined Plaintiff on March 21, 2006,
9 and noted that Plaintiff's reports from his teachers (TRF) indicated
10 that Plaintiff fell within the clinically significant range in the
11 area of rule breaking behavior and aggressive behaviors, and in the
12 borderline range of thought problems and attention problems. (Tr.
13 230.)

14 In the 2007 report, Plaintiff's teacher indicated that he had
15 "an obvious problem" in five categories related to acquiring and
16 using information. (Tr. 166.) The teacher also reported that
17 Plaintiff had several "slight problem[s]" with attending and
18 completing tasks. (Tr. 167.) In the 2008 report, Plaintiff's
19 teacher indicated that he had "very serious problem[s]" in three
20 categories related to acquiring and using information, one "very
21 serious problem" and five "serious problem[s]" in attending and
22 completing tasks. (Tr. 197-98.)

23 On *de novo* review, the record reveals that Ms. Beauchamp's
24 assessment is consistent with Plaintiff's test results and teacher
25 evaluations that Plaintiff had marked limitations in acquiring and
26 using information and attending and completing tasks. (Tr. 265.)
27 The ALJ's determination that Ms. Beauchamp's opinion deserved little
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1 weight because it was inconsistent with test results and teacher
2 reports was not supported by substantial evidence in the record.

3 In cases where ALJ erred by providing one or more invalid
4 reasons for disbelieving a claimant's testimony, but also provided
5 valid reasons unsupported by the record, the court has held the
6 inclusion of the invalid reasons harmless error. *Molina v. Astrue*,
7 674 F.3d 1104, 1115 (9th Cir. 2012); *Bray v. Comm'r of Soc. Security*
8 *Admin.*, 554 F.3d 1219, 1227 (9th Cir. 2009). In that context, the
9 error was deemed harmless because substantial evidence remained that
10 supported the ALJ's decision and the error did not negate the
11 validity of the ALJ's ultimate conclusion. *Molina*, 674 F.3d at
12 1115; *Batson v. Comm'r of the SSA*, 359 F.3d 1190, 1197 (9th Cir.
13 2004). In this case, the invalid reasons provided by the ALJ for
14 discounting Ms. Beauchamp's opinions were not harmless, because
15 substantial evidence does not support the remainder of the ALJ's
16 decision.

17 **B. Lay Opinions.**

18 Plaintiff also argues that the ALJ failed to give reasons for
19 discounting the opinions of Plaintiff's teachers and mother. (ECF
20 NO. 14 at 9-12.) The ALJ's decision did not discuss the weight, if
21 any, he afforded to the opinions of Plaintiff's teachers or mother.

22 **1. Plaintiff's Mother.**

23 Plaintiff's mother completed a Function Report about Plaintiff
24 on March 8, 2007, and on January 10, 2008. (Tr. 145-54; 175-84.)
25 In both reports, Plaintiff's mother indicated Plaintiff had
26 limitations in his ability to (1) progress in learning; (2) help
27 himself and cooperate with others in taking care of personal needs;

1 and (3) pay attention and stick with a task. (Tr. 149; 152-53; 179;
2 182-83.) Plaintiff's mother also indicated on both reports that
3 Plaintiff is unable to make new friends, get along with adults and
4 his teachers, and he is unable to play team sports. (Tr. 151; 181.)

5 In childhood disability cases, where the child is unable to
6 adequately describe his symptoms, the Commissioner accepts the
7 testimony of the person most familiar with the child's condition,
8 such as a parent. *Smith ex rel. Enge v. Massanari*, 139 F.Supp.2d
9 1128, 1134 (9th Cir. 2001). When an ALJ discounts a parent's
10 testimony, he must give reasons that are "germane" to that witness.
11 *Valentine v. Comm'r Soc. Sec. Admin.*, 574 F.3d 685, 694 (9th Cir.
12 2009).

13 In this case, the ALJ failed to mention what weight, if any, he
14 gave to Plaintiff's mother's assessment of the severity of
15 Plaintiff's impairments. This was error. *Merrill v. Apfel*, 224
16 F.3d 1083, 1086 (9th Cir. 2000); citing *Dodrill v. Shalala*, 12 F.3d
17 915, 919 (9th Cir. 1993)("If the ALJ wishes to discount the
18 testimony of the lay witnesses, he must give reasons that are
19 germane to each witness.") On remand, the ALJ should reconsider and
20 provide reasoning for the weight he assigns to Plaintiff's mother's
21 testimony.

22 **2. Teacher Assessments.**

23 The record contains two teacher evaluations, one completed on
24 January 30, 2008, related to Plaintiff's repeat of first grade, by
25 his teacher Alma Ramirez, and the other completed April 17, 2007, by
26 Valeria Gonzalez, Plaintiff's initial first-grade teacher. (Tr.
27 172; 203.) The rating key range is from one through five, with one
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1 indicating no problem, and five indicating "a very serious problem."
2 (Tr. 197.)

3 The 2007 teacher evaluation, completed by Ms. Gonzalez,
4 evaluated Plaintiff after his first grade year. The evaluation
5 assessed Plaintiff with several "obvious problem[s]" in the
6 acquiring and using information domain, including: (a) comprehending
7 oral instructions; (b) reading and comprehending written material;
8 (c) understanding and participating in class discussions; (d)
9 providing organized oral explanations and adequate descriptions; and
10 (e) expressing ideas in the written form. (Tr. 166.) Ms. Gonzalez
11 commented, "Depending upon Juan's mood/behavior he can become very
12 defiant and refuse to do anything. Often times, he must be
13 redirected or provided alternatives/choices." (Tr. 166.) In the
14 interacting and relating with others, Ms. Gonzalez opined Plaintiff
15 had obvious problems with (a) playing cooperatively with other
16 children; (b) expressing anger appropriately; (c) taking turns in
17 conversation; and (d) using adequate vocabulary and grammar to
18 express thoughts/ideas in general, everyday conversation. (Tr.
19 168.) In the caring for himself domain, Ms. Gonzalez found that
20 Plaintiff had a serious problem with both handling frustration
21 appropriately and being patient when necessary, and he had an
22 obvious problem using appropriate coping skills to meet daily
23 demands of school environment. (Tr. 170.)

24 The 2008 teacher evaluation indicates some of Plaintiff's
25 problems worsened. In the acquiring and using information domain,
26 Ms. Ramirez assigned Plaintiff a four, meaning a "very serious
27 problem," for the following: (a) comprehending oral instruction; (b)
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1 understanding school and content vocabulary; and (c) reading and
2 comprehending written material. (Tr. 197.) Ms. Ramirez commented
3 that Plaintiff had a hard time staying on task, and he did "o.k.
4 when he receives one on one help." (Tr. 197.) In the attending and
5 completing tasks domain, Ms. Ramirez found Plaintiff had "a very
6 serious problem" in completing class work and homework assignments,
7 and "serious problem[s]" in (a) paying attention when spoken to
8 directly; (b) sustaining attention during play/sports activities;
9 (c) focusing long enough to finish assigned activity or task; (d)
10 organizing own things or school materials; and (e) completing work
11 accurately without careless mistakes. (Tr. 198.) Ms. Ramirez
12 assessed Plaintiff with one additional serious problem in the
13 interacting and relating with others domain related to his ability to
14 use adequate vocabulary and grammar to express thoughts/ideas in
15 general, everyday conversation. (Tr. 199.) Ms. Ramirez indicated
16 Plaintiff had several "obvious problem[s]" in many of the domains.
17 (Tr. 197-201.)

18 In the evaluation of child disability cases, the opinions of a
19 child's teachers are highly probative. As is the case with all
20 "other source" or lay testimony, the educators' opinions must be
21 considered and the weight given to them explained. *Stout v.*
22 *Commissioner, Social Sec. Admin.*, 454 F.3d 1050, 1053 (9th Cir.
23 2006). If teachers' opinions are rejected, the ALJ must give
24 specific "germane" reasons for doing so. *Id.* Further, the opinions
25 of "other sources" such as teachers, who have had extended contact
26 with a claimant, may be used to reject the opinions of a treating or
27 examining medical source, if their opinions are supported by other
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1 medical evidence in the record. Social Security Ruling (SSR)
2 06-03p.

3 The ALJ's failure to explain his rejection of Plaintiff's
4 mother and Plaintiff's teachers was error. The error is not
5 harmless because it is not inconsequential to the ultimate
6 non-disability determination. *Stout*, 454 F.3d at 1055. Under these
7 circumstances, remand for further proceedings is appropriate.
8 *Merrill*, 224 F.3d at 1086 (remanding for evaluation of child
9 claimant's claim under Listing of Impairments where, among other
10 things, ALJ failed to provide specific explanation for rejecting
11 testimony of claimant's mother).

12 Because remand on these issues is necessary, Plaintiff's
13 remaining issues will not be addressed.

14 **C. Remand for Additional Proceedings.**

15 The decision whether to remand for further proceedings is
16 within the discretion of the district court. *Harman*, 211 F.3d at
17 1175-78. Where no useful purpose would be served by further
18 proceedings, or where the record has been fully developed, it is
19 appropriate to exercise this discretion to direct an immediate award
20 of benefits. *Harman*, 211 F.3d at 1179 (decision whether to remand
21 for further proceedings turns upon their likely utility). However,
22 where there are outstanding issues that must be resolved before a
23 determination can be made, and it is not clear from the record that
24 the ALJ would be required to find the claimant disabled if all the
25 evidence were properly evaluated, remand is appropriate. *Id.* Here,
26 as set out above, outstanding issues remain before a finding of
27 disability can be made. Accordingly, remand is appropriate.

CONCLUSION

Having reviewed the record and the ALJ's findings, the court concludes the ALJ's decision is not supported by substantial evidence and is based on legal error. On remand, the ALJ should reconsider the weight afforded to the opinions of Ms. Beauchamp, Plaintiff's mother, and Ms. Gonzalez and Ms. Ramirez and support his findings with specific, legitimate or germane reasons supported by substantial evidence in the record. Accordingly,

IT IS ORDERED:

1. Plaintiff's Motion for Summary Judgment (**ECF No. 13**) is **GRANTED** and the matter is **REMANDED** to the Commissioner for additional proceedings.

2. Defendant's Motion for Summary Judgment (**ECF No. 15**) is **DENIED**;

3. An application for attorney fees may be filed by separate motion.

The District Court Executive is directed to file this Order and provide a copy to counsel for Plaintiff and Defendant. Judgment shall be entered for Plaintiff, and the file shall be **CLOSED**.

DATED August 31, 2012.

S/ CYNTHIA IMBROGNO
UNITED STATES MAGISTRATE JUDGE